Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANTHONY RUSSO
Petitioner

Versus

JOSEPH MARUT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN AFFIRMING THE DISTRICT COURT'S ORDER GRANTING DEFENDANT, POLICE OFFICER'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S 42 U.S.C. §1983 CLAIM FOR ARREST WITHOUT PROBABLE CAUSE WHERE THE DISTRICT COURT CONCLUDED THAT Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979) IMMUNIZED FROM §1983 LIABILITY POLICE OFFICERS WHO ARRESTED ANY PERSON WITH THE SAME NAME AS A PERSON NAMED ON A WARRANT WITHOUT REGARD FOR KNOWN AND READILTY OBTAINABLE FACTS EXCULPATING THE ARRESTEE?

PARTIES INVOLVED IN THE PROCEEDING

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

ANTHONY RUSSO,
Petitioner

versus

JOSEPH MARUT
Respondent

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Anthony Russo, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

Order of the United States Court of Appeals For Third Circuit rendered 8/20/96, is unrecorded and appears at page 1a of the Appendix. Order and Opinion of the United States District Court for the Middle District of Pennsylvania 1/24/96 is recorded at ___ F.Supp. ___ (MD Pa. 1996) and appears at page 2a of the Appendix.

The final Order of the United States Court of Appeals for the Third Circuit is dated August 20, 1996 and the Petition for Writ of Certiorari is filed timely witin ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

42 U.S.C. §1983 and United States Constitution, Amendment 4.

STATEMENT OF THE CASE

a) **Procedural History**

Plaintiff/Petitioner filed this action pursuant to 42 U.S.C. §1983 against Defendant/police officer seeking damages arising from Defendant's alleged arrest of Plaintiff without probable cause. On November 7, 1994, Defendant filed an Answer to Plaintiff's Complaint. After discovery on or about May 2, 1995, Defendant filed a Motion For Summary Judgment. Plaintiff filed a brief in opposition, and Defendant filed a reply brief. On January 24, 1996, the District Court entered an Order granting Defendant's motion. On August 20, 1996, the United States Court of Appeals For the Third Circuit affirmed the order granting Defendant's motion for summary judgment. Plaintiff now respectfully petitions this Honorable Court for a writ of certiorari to review the order affirming

the District Court Order granting summary judgment.

b) **Statement of Facts**

No dispute exists that wholly innocent Petitioner Anthony Russo, was wrongfully arrested for murder at church while attending his mother's funeral. Defendant is a Pennsylvania State Police Officer who arrested Plaintiff.

The Pennsylvania State Police had a warrant for the arrest of Anthony Ernest Russo of 177 1/2 Scott Street, Wilkes Barre, Pennsylvania, a white male 68" tall, 220 pounds, with a date of birth of October 10, 1960. **App. 69a.** The warrant was for the murder of Hector Maldanado on March 1, 1991. Fugitive Anthony Russo, [hereinafter referred to as "fugitive"], had two tattoos on his arm, one of a "Bull", the other the name "Carrie Ann". **App. 69a.**

Plaintiff's Mother, Helen Russo, wife

of Gerard V. Russo, died on August 20, 1993. Plaintiff's mother's obituary appeared in the Times Leader on Saturday, August 21, 1993. Helen Russo's residence was John Street, Pittston, Pennsylvania. **App. p. 87a.** Gerard and Helen Russo had four children, Anthony, Steven, Gerard, Jr. and Geraldine Mikelski. **App. p. 87a.**

The incident giving rise to this action began when Trooper Stitzer read Helen Russo's obituary in the newspaper, and reported that Helen Russo had a son named Anthony Russo. **App. p. 202a**, and he reported the fact to Trooper Scoble. Trooper Scoble relayed this information to Trooper Kaehn who was duty officer. Trooper Kaehn assumed that Anthony Russo, son of decedent Helen Russo, was fugitive Anthony Russo:

> "A. ...I was under the assumption that this was Anthony Russo...when I'm told its Anthony Russo, I assume it's Anthony Russo.

Q. So you're saying the way you were told, you--
A. when I was told initially, I had assumed it was Anthony Russo."
App. p. 44

Trooper Kaehn knew that the Maldonado investigation was being handled by Trooper William Bevan from the Pennsylvania State Police. **App. p.43a.** Trooper Bevan knew that the family of fugitive Russo lived in Bloomsburg, Columbia County, and surveillance was put on the Russo family farm by the Bloomsburg barracks. **App. p. 75a.** The PA State Police had a specific address for fugitive Russo's family farm:

"...the residence of Anthony C. Russo at R.D. #3, Box 285, Catawissa, Pa....The above listed residence is located along T325 (Indian Territory Road) near the intersection with T412 in Locust Township, Columbia Co..."

Although the facts were known to them, no one ever bothered to put the facts in sequence...decedent, Helen Russo, mother of four children, who lived at John Street, Pittston, was not the mother of fugitive

Anthony Russo, whose parents lived at R.D. #3, Box 285, Catawissa, Pennsylvania.

As Defendant, Marut, concedes, he started this investigation on someone else's assumption that the decedent Helen Russo was the mother of fugitive Anthony Russo:

> "...they were surveilling the funeral of Anthony Russo's mother looking for Mr. Russo." **App. p. 59a**

See, also, **App. p. 69a** The assumption was deliberate and erroneous.

Interestingly, the Pennsylvania State Police attempted to blame the funeral director for the misidentification:

> "At that point, I saw the funeral director, Yeosock, down on the sidewalk. And I approached Yeosock with the photograph that we had of Russo and I asked him is this man inside. and He said it looks like him."
> **App. p. 91a, 95a, 106a.**

William Yeosock flatly contradicted this testimony:

"Q. Can you take me through the

remainder of the conversation with that trooper?

A. I think he went down, I'm not sure, I think he went down and got a picture and brought it back and showed us. We all stood there on the portico and showed us the picture and asked me if it was the same one up in front...I said that one of the pall-bearers does have earrings in his ears. That was the only thing that was similar to the picture when he showed me the picture.

* * *

Q. Next sentence, 'This officer then described Russo to Yeosock and he responded that Russo was inside the church.'?

A. No. Again that statement is not true. Somewhere in that period of time they brought a picture up to me and asked me about the picture.
I said that the only similarity that I can say with the man is that the--what stood out in my mind was the earrings because the picture did not show the same liking as the man in church...

* * *

Q. How can you be so certain that you didn't say, yeah, that looks like the guy?

A. Because it didn't. The photo didn't look like the follow. There was too many things different on the photo; the haircut and everything else, and I don't know exactly what it was, but the photo did not match the individual in the church...
Q. Is it possible that you could have said, it could be the guy?
A. No." **App. pp. 45a-50a**

The testimony of the funeral director, explicitly informed Defendant that Plaintiff, Anthony Russo, did not resemble the photograph of fugitive Anthony Russo. Id. Despite that fact, Defendant ordered Plaintiff to be arrested based upon the deliberate and erroneous assumption that Plaintiff was fugitive Russo. **App. p. 70a.**

The Maldonado prosecution involved three police agencies, namely, Wilkes Barre Police Department, PA State Police and Luzerne County District Attorney's Office The Wilkes Barre Police Department knew that fugitive Russo had two siblings, a brother Joseph, with a criminal record, and a sister living in Catawissa. **App. 159a**) Officer John Curham of Wilkes Barre Police Department personally observed fugitive Russo prior to the murder of Hector Maldonado. **App. 167a.** Prior to apprehending Plaintiff, no one from the PA State Police ever contacted the Wilkes Barre Police

Department for assistance in identifying fugitive Russo. **App. 170a.**

Furthermore, Wilkes Barre Police Department had access to the information concerning the name of the fugitive's parents. **App. 174a.** Other Wilkes Barre Police Officers knew fugitive Russo on sight, **App. 176a**), and fugitive Russo was known to the police as a bouncer at a strip club known as Topper's. **App. 130a, 131a.** After the Pennsylvania State Police had Plaintiff in custody, Defendant asked for assistance of the Wilkes Barre Police Department in identifying Plaintiff as fugitive Russo. **App. 179a-181a, 142a.** The officers from Wilkes Barre did not identify Plaintiff as fugitive Anthony Russo.**App. 131a, 143a:** "...I had no idea who the guy was in the car..."). Despite this subsequent development, Defendant elected to keep Plaintiff in handcuffs and in custody,

and took him to the Wyoming Barracks. **App. 132a.**[1] As Chief of Police Coyne eloquently articulated, if the PA State Police asked for assistance in determining whether or not Plaintiff was fugitive Russo, it would have been provided:

> "Q. Now, before that point in time had anybody from the Pennsylvania State Police contacted you involving doing any preliminary work relative to I.D.-ing Anthony Russo?
> **A. No Sir.**
> Q. If you were contacted would you have cooperated with them?
> **A. 100 percent.**
> * * *
> Q. Let's assume for purposes of this question that the Pennsylvania State Police had read this obituary in the newspaper on August 20th, 1993, and they began a surveillance of the funeral home on the first night. Would you have participated in this surveillance if requested by them?
> **A. If our department was aware of it,**

---

1. It is important to note that, in the deposition of Defendant, he conveniently forgot about the episode of taking Plaintiff, in handcuffs, to the Wilkes Barre police for identification, and that Wilkes Barre officers did not identify Plaintiff as fugitive Anthony Russo.

absolutely.
Q. And would you have been able to find out, to go through your department and find out which officers, if any, could make a personal I.D. of Anthony Russo?
A. If I had the time and the request, I would do everything in my power to assist, yes.

* * *

Q. And do you have a mechanism in your department for communicating with all of your officers?
A. Yes.
Q. Could you have made a request of your officers as to whether or not any of them had personal contact with Anthony Russo and--
A. Of course.
Q. --they could personally identify him?
A. That request would have been done, yes.
Q. But your first information was after the Anthony Russo who is my client was already in custody?
A. That is correct. App. 113a-116a

For three days, PA State Police had the information that Anthony Russo, son of Helen and Gerard Russo, might come to his mother's funeral. The Pennsylvania State Police affirmatively and deliberately decided to play it alone. Only after Plaintiff was in custody--only after Defendant saw the non-matching tattoos on

Plaintiff's arms--only after Plaintiff protested his innocence--did Defendant make an investigation to decide if the person he arrested at his mother's funeral was fugitive Anthony Russo.

Upon these facts, the District Court granted Defendant's Motion for Summary Judgment. The Court of Appeals affirmed without opinion.

REASONS RELIED UPON FOR ALLOWANCE OF APPEAL

Review by Certiorari is appropriate in the case at bar under Rule 17 (1) of the Rules of this Honorable Court in that a Federal Court of Appeals rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

1. The District Court erred as a matter of law in its interpretation and

application of Baker v. McCollan, infra. The District Court held that Baker v. McCollan, infra, is dispositive in this case. The Supreme Court in Baker, however, dealt with facts and legal issues which are distinct from those in this case. Moreover, following the District Court's reasoning and opinion, a police officer would be absolutely immune from claims pursuant to 42 U.S.C. §1983 if he arrests any person with the same name as a person named in an arrest warrant even if the officer deliberately ignores known and easily obtainable facts proving the arrestee is not the person named in the warrant. As discussed below, the Court thus erred as a matter of law in concluding Baker bars Plaintiff's §1983 claims under the facts in this case.

A. The facts and legal issues in Baker are distinct from those at bar. In Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d

433, 99 S.Ct. 2689 (1979), an individual's brother tricked police by using a duplicate of the individual's driver's license to prevent his proper identification by police. As a result of this trickery, an arrest warrant was issued against the individual instead of his brother. Ultimately, the individual was arrested pursuant to the arrest warrant lawfully issued upon probable cause, and directed to the individual instead of his brother. Because the brother tricked the police into believing that the named individual committed the crime, there was no attack on the validity of the warrant, and all parties agreed that the arrest warrant was facially valid, even though directed to the individual because of the brother's trickery. After the individual was arrested pursuant to the valid warrant, the individual explained to the arresting officer that the

warrant should have been directed to his brother and not to him. The arresting officer arrested the individual anyway, despite the individual's protestations of innocence. After the individual was arrested and incarcerated pursuant to the valid warrant directed to him, the brother's trickery was discovered, and the individual was discharged from custody.

After discharge, the individual sued the arresting officer not challenging the validity of the warrant, but complaining that the arresting officer was liable to him for the arrest because the arresting officer did not further investigate his claim of innocence. On this posture, this Honorable Court held that an officer executing an arrest warrant properly directed to the named individual is not required to independently investigate every claim of innocence, and the arresting officer is not

liable to the innocent person because the warrant of arrest was properly, albeit by trickery, directed to the named individual.

Hence, the ruling by this Honorable Court in Baker v. Mccollan, supra, is limited to the fact situation that a person wrongfully identified in an arrest warrant by the trickery of a third party has no right to an independent investigation by the arresting officer merely because the person protested his innocence.

In the case at bar, Defendant does not contend that he had a valid warrant of arrest for Plaintiff. Defendant concedes that the warrant for arrest was for a different Anthony Russo, and that the warrant of arrest was not valid for Plaintiff. Hence, Baker v. McCollan, supra, was not applicable to the facts of this case.

B. The lower courts erred as a matter of law in its interpretation of the

Baker decision. Defendant postulated, and the District Court agreed, that once a valid warrant of arrest issues, an arresting officer is immunized from liability for a wrongful arrest when the arresting officer arrests the wrong person. That is not what Baker v. McCollan, supra, holds, and is contrary to the law regarding an arrest without probable cause. The arrest warrant is only valid for the person accused of the crime. An arrest warrant does not authorize a police officer to arrest the wrong person.

2. Thelower courts erred as a matter of law in disposing of Plaintiff's §1983 claim based upon Baker. The fact that Plaintiff was arrested by warrant on the basis of mis-identification and "assumptions" by the arresting officer creates an issue of fact for the jury. Please see, e.g. Deary v. Three Un-Named Police Offic-

ers, 746 F.2d 195 (3d Cir, 1984), (where the Third Circuit addressed the issue of liability of officers arresting the wrong person based upon the resemblance of the person arrested to the person who should have been arrested.

A. Plaintiff stated a valid §1983 claim by alleging Defendant deliberately arrested Plaintiff who Defendant knew or upon minimal investigation could have determined that Plaintiff was not the fugitive sought.

This Plaintiff did not question the validity of the warrant, but complains of the constitutionality of the arrest.

Plaintiff produced substantial evidence that Defendant knew or upon minimal investigation could have determined that Plaintiff was not the fugitive sought.

Genuine issues exist concerning Plaintiff's §1983 claim that Defendant arrested

Plaintiff without probable cause. Basically, Defendant claimed and the lower courts agreed that Plaintiff's name, tattoos and earrings created probable cause for Plaintiff's arrest. Plaintiff, however, demonstrated that Defendant knew or reasonably should have known that Plaintiff was not the person named in the warrant.

i. Earrings. The lower courts placed undue reliance upon the fact that Plaintiff was wearing earrings, and the fugitive was known to have worn earrings. Like it or not, at this point in time, the fact that a male may be wearing earrings is hardly a distinguishing characteristic. Although twenty or even ten years ago, the number of males who wore earrings was relatively small, the number has escalated dramatically. In the nineties, males wearing earrings is commonplace. While it is true the number of males in certain professional

positions who wear earrings is relatively small, this Honorable Court should take judicial notice of the fact that within the general population, it is no longer extraordinary for a male to wear earrings.

The lower courts thus relied too heavily upon the fact that Plaintiff was wearing earrings to support a finding of probable cause.

ii. Tattoos The lower courts erroneously concluded that Plaintiff's tattoos added substantial credibility to the identification of Plaintiff as the fugitive, even though Plaintiff's tattoos were different from the fugitive's tattoos. Millions of Americans have tattoos. Plaintiff's tattoo said "Toni Ann" not the same name as the fugitive's tattoo. Plaintiff had a tattoo of a faded creature, not a bull, which the fugitive had. Plaintiff's tattoos therefore distinguished Plaintiff

from the fugitive. At very least, Defendant deliberately disregarded the differences in tattoos.

iii. Name Contrary to the lower courts' conclusion, Defendant may not arrest a person based solely upon the fact that that person has the same name as someone on an arrest warrant. Here, importantly at the time of Plaintiff's arrest, Defendant had in his possession a photograph of the fugitive which bore NO resemblance to Plalintiff. Despite the funeral director's clear testimony that he told Defendant definitely that Anthony Russo bore no resemblance to the fugitive in the photograph, Defendant deliberately arrested Plaintiff as he placed his mother's casket in a hearse.

Moreover, the record is clear that the PA State Police had at their immediate disposal information that Plaintiff, the

son of Gerard and the late Helen Russo of John Street, Pittston, Pennsylvania was not fugitive Russo. The PA State Police knew that the family of fugitive Russo lived at R.D. #3, Box 285, Catawissa, Pennsylvania. The Plaintiff was specifically identified in the obituary of Helen Russo, and her residence was specifically identified as John Street, Pittston, Pennsylvania.

Furthermore, fugitive Russo was known to have only one sibling, named Joseph, who was known to Wilkes Barre Police Department. According to the obituary, Plaintiff had three siblings, Steven, Gerard, Jr. and Geraldine Mikelski, and none named Joseph.

Finally, fugitive Russo was known by many. The Wilkes Barre Police Department knew him. The investigator from the District Attorney's Office, Michael Dessage, was personally involved in the Russo investigation. Inexplicably, none of the inves-

tigators were called until after Plaintiff, Anthony Russo, was apprehended and detained. As the Chief of Police of the Wilkes Barre Police Department testified, the assistance of the entire department was available to the PA State Police just for the asking.**App. 113a-116A**

Defendant knowingly and/or deliberately caused Plaintiff to be apprehended, detained, and arrested without probable cause. After Plaintiff was in his custody, and after he examined non-matching tattoos on Plaintiff's arms, Defendant called trooper Kaehn to verify that fugitive Russo had a "bull tattoo" on his arm. Trooper Kaehn confirmed that it was a bull. Defendant elected to disregard this information, and elected to keep Plaintiff in custody.

After Plaintiff advised Defendant that he was not fugitive Anthony Russo, Defendant finally decided that he should

get assistance from other police departments that actually knew fugitive Russo. too little; too late.

The reality is that this is not a case where the police were confronted with a situation where they had to make a split-second decision. The obituary of Helen Russo appeared in the newspaper on Saturday August 21, 1993. Plaintiff was arrested at the funeral on Monday, August 23, 1993. The Pennsylvania State Police intentionally and purposefully refused to choose any reasonable options. Consider:

1) Fugitive Russo was a known commodity to the Wilkes Barre Police Department, the PA State Police (Trooper Began), and the Luzerne County District Attorney's Office. **NONE OF THESE PEOPLE WERE CONTACTED PRIOR TO ARRESTING, APPREHENDING AND DETAINING PLAINTIFF AT HIS MOTHER'S FUNERAL.**

2) The obituary information contradicted known information about fugitive Russo.

3) Prior to arresting Plaintiff at his mother's funeral, the PA State Police could have obtained assistance from the Wilkes Barre Police Department and the Luzerne County District Attorney's office to obtain help in determining if Plaintiff was fugitive Russo; and

4) Trooper Bevans told his superiors that the parents of fugitive Russo lived in Catawissa. The decedent lived in Pittston, and died in Plains. Catawissa is another whole county away. No one from the PA State Police put these two facts together, namely, if Anthony Russo has parents in Catawissa, why are we at a funeral home in Plains for a woman who lived in Pittston thinking she is the mother of fugitive Russo?

As clearly indicated in Deary v. Three Un-Named Police Officers, supra, the question is as follows: "...would or should a reasonable person in the shoes of the individual police officers have known that he was violating another's clearly established constitutional rights by taking her into custody on the basis of his then-known information..." 746 F.2d at 192. As set forth above, Defendant had no information indicating that Plaintiff was fugitive Russo. Plaintiff was coming to his mother's funeral to be her pallbearer. The fugitive was running away from the law. There was nothing known to the Defendant to indicate that Plaintiff was a fugitive. As Trooper Kaehn so simply stated--and as Defendant clearly wrote--they assumed that Plaintiff was the fugitive notwithstanding known facts to the contrary. Defendant thus arrested Plaintiff without probable

cause in violation of 42 U.S.C. §1983. At very least, genuine issues of material fact exist concerning the existence of probable cause. Cooper v. City of Chester, supra; 42 U.S.C. §1983. Hence, the District Court order granting Defendant's motion for summary judgment ought to be reversed.

3. The lower courts erred as a matter of law in concluding that Defendant is entitled to "qualified immunity" where freedom from arrest without probable cause is a clearly established right, and Defendant reasonably should have known Plaintiff was not the fugitive sought.

The District court concluded that Defendant came within the defense of "qualified immunity". In Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), this Honorable Court narrowly defined "qualified immunity" to mean that governmental officials are not

liable for damages where their conduct as determined by objective, not subjective, standards, does not violate "clearly established constitutional rights of which a reasonable person would have known. Where the violation is of a "clearly established constitutional right", e.g., no arrest without probable cause, then as a matter of law, the defense of qualified immunity is not applicable. See, Wood v. Strickland, 420 U.S. 308, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975); Malley v. Briggs, 475 U.S. 335, 89 L.Ed.2d. 271, 106 S.Ct. 1092 (1986).

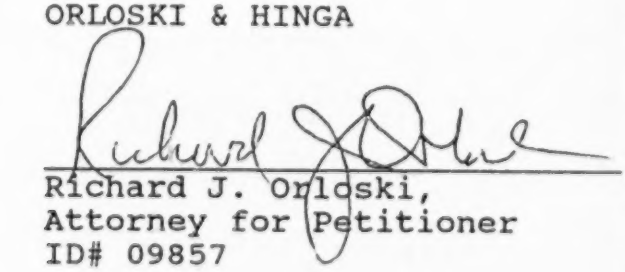
In the case at bar, there is nothing "objectively reasonable" about the Defendant's conduct. As set forth above, Defendant deliberately disregarded facts proving that Plaintiff was not fugitive Russo. Probable cause is not a "hunch" or an "assumption" that Plaintiff is a fugitive. There was not a single objective

fact indicating the probable cause for arresting Plaintiff on a warrant issued for an entirely different person. Nevertheless, the District Court granted Defendant's motion for summary judgment by concluding that "Plaintiff's arrest was objectively reasonable". **App. 24a.** The record is otherwise. The Order granting Defendant's motion for summary judgment ought to be reversed. Hence, Plaintiff respectfully requests review by this Honorable Court.

CONCLUSION

For the foregoing reasons, Anthony Russo's Petition for a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7103

ANTHONY RUSSO,
Appellant

v.

JOSEPH MARUT

On appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Civ. No. 94-01613)
District Judge: Honorable Edwin M. Kosik

Argued August 15, 1996

BEFORE: GREENBERG and ALITO, Circuit Judges, and DEBEVOISE, District Judge

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is ADJUDGED and ORDERED that the judgment of the district court entered January 24, 1996, be and is hereby affirmed. Costs taxed against appellant.

BY THE COURT:

Circuit Judge

Dated: August 20, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY RUSSO Plaintiff	:	
	:	CIVIL NO. 94-1613
vs.	:	
	:	(Judge Kosik)
JOSEPH MARUT, Defendant	:	

MEMORANDUM

Before the court is the defendant's motion for summary judgment. For the reasons which follow, the motion for summary judgment will be granted.

Background

Plaintiff, Anthony Russo, filed a complaint in the instant action pursuant to 42 U.S.C. §1983 against the defendant, Pennsylvania State Police Lieutenant Joseph Marut, on October 3, 1994. The basis of plaintiff's complaint is the arrest and search of plaintiff without probable cause

in violation of his Fourth and Fourteenth Amendment constitutional rights.[1] An answer to the complaint raising affirmative defenses was filed by defendant on November 7, 1994. Defendant filed a motion for summary judgment and statement of material facts on April 28, 1995. A brief in support of the motion for summary judgment and supporting documents was filed with the court on May 2, 1995. Plaintiff's answer to the statement of material facts and supporting documentation was filed on May 26, 1995. Plaintiff's brief in opposition to the defendant's motion for summary judgment and supplemental documentation was filed on June 5, 1995. Defendant filed a

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1.The instant action arises out of a case of false arrest and mistaken identity. For purposes of this Memorandum we will identify the individuals involved as the plaintiff Anthony Russo and the fugitive Anthony Russo.

reply brief on June 7, 1995.

Argument

Summary judgment is appropriate only when there is no genuine issue of material fact to be resolved. Fed.R.Civ.P. 56; Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 84 (3d Cir. 1982). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. The entire record must be examined in light most favorable to the non-moving party. Continental Ins., supra. Additionally, the Supreme Court has ruled that Fed.R.Civ.P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett,

477 U.S. 317, 322 (1986), cert. denied 484 U.S. 1066 (1988). The Court further stated that "Rule 56(e)...requires the non-moving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324.

Defendant makes two arguments in support of his motion for summary judgment. First, defendant argues that plaintiff was not subject to false arrest because his arrest was pursuant to a facially valid warrant. Defendant also argues that he is entitled to qualified immunity from suit for his actions arising out of the arrest and detention of plaintiff.

In support of the motion for summary judgment, the defendant filed his deposition testimony and the deposition testimony

of several police officers and the funeral director involved in the incident. In his deposition, the defendant, a lieutenant with the Pennsylvania State Police, testified that in March 1991 he became involved with the Hector Maldonado murder case for two days as the liaison officer with the Wilkes Barre Police Department. After two days, arrests were made of two individuals, John Smith and Anthony Tolbert, and a warrant for arrest was issued for Anthony Russo, who fled the area. Lt. Marut was not familiar with the fugitive Anthony Russo and he had no contact with the case prior to the instant incident except to speak occasionally with the investigator to see if there was anything new. He had a photograph of the fugitive Anthony Russo and a physical description. The fugitive Anthony Russo was almost 33 years old. He was a white male, 68 inches tall (5'8"),

220 pounds, black hair, brown eyes with a bull tattoo on his left upper arm and the name Carrie Ann on his right upper arm". He was also told on the morning of August 23, 1993 that the fugitive Anthony Russo had a scar on his right wrist and four earrings in his ear.

In describing the plaintiff Anthony Russo, Lt. Marut stated that he was approximately five eight or five nine, with black hair and a mustache. he weighed approximately 230or 240 pounds and looked to be in his thirties. After he was taken into custody, Lt. Marut looked at plaintiff Anthony Russo's arms. He had two tattoos, an animal on his upper left arm and a faded tattoo that said Toni Ann on his upper right arm. There was also a scar on his right wrist.

After comparing the plaintiff Anthony Russo with the description of the fugitive

Anthony Russo, it was Lt. Marut's opinion that they had the right man in custody. The plaintiff Anthony Russo fit the description physically, he had the tattoos, the scar on his wrist and the earrings in his ear. It was not until he got the fingerprint results back that he realized that they had the wrong Mr. Russo.

Prior to August 23, 1993, the date of the incident with Plaintiff, Lt. Marut was not involved in or aware of the attempt to bring the fugitive Anthony Russo into custody at the funeral. On August 23, 1993, he arrived at work at 8:30. At that time he spoke with Sergeant Krawetz, who told him that they were surveilling the funeral of Anthony Russo's mother looking for Mr. Russo. Later that morning, he was told by Sergeant Krawetz that they had gotten information from the funeral director that Anthony Russo was in the church

A meeting was set up in the parking lot of an ice cream parlor near the church and they discussed how they wanted to proceed.

Because of Mr. Russo's history of violence, the troopers decided to arrest Mr. Russo after he placed his mother's casket in the hearse. The approximately eight [8] police officers involved then set up around the church.

Lt. Marut was positioned around the corner from the church and he sat in his car until he was informed by radio that Mr. Russo had been taken into custody. He then proceeded to the alleyway where Mr. Russo was being held. He asked Mr. Russo who he was and Mr. Russo identified himself. Another officer told Mr. Russo that they had a warrant for his arrest for criminal homicide. Mr. Russo said they had the wrong man. However, Lt. Marut determined

that Mr. Russo fit the physical description and had four earrings running down his ear. Lt. Marut then called Trooper Kaehn at the state police barracks to check the information about the tattoos and scar on his wrist. Lt. Marut checked Mr. Russo and was positive they had the man they were looking for, so he placed him under arrest.

Mr. Russo was taken back to the state police barracks where he was given his constitutional rights and questioned about the homicide. He also consented to be fingerprinted so his fingerprints could be compared to the fingerprints of the accused. In all, Mr. Russo remained at the police barracks for approximately two hours and ten minutes. During that time, Mr. Russo was handcuffed in front. He was allowed to smoke and was given a soda while they waited for the fingerprint comparison to come back. After the fingerprint

comparison did not match, Mr. Russo was told they had the wrong person. They took off the handcuffs, apologized to him and took him home.

The testimony of Lt. Marut as to what had occurred surrounding the arrest of plaintiff outside the church was confirmed by testimony of Sergeant Krawetz, who learned of the obituary of Helen Russo from Trooper Kaehn. As a result of Trooper Kaehn's phone call, Sgt. Krawetz instructed her to ascertain if the Anthony Russo named in the obituary was the same individual sought by the police. He contacted the trooper involved in the case and various surveillances were put in place.

On Monday morning, two state troopers were dispatched to conduct surveillance at the funeral home and church. One of the troopers described in the physical characteristics to the funeral director and he

was told that an individual by the name of Anthony Russo, who matched the physical description, was in the church. At that point, the contingency of troopers from the station was assembled.

Sgt. Krawetz and another trooper approached the funeral director with a picture of the fugitive Anthony Russo. The funeral director said that the photograph looked like the individual named Anthony Russo who was in the church. The funeral director informed them that the Anthony Russo in the church was a pallbearer and was wearing black. An arrangement was made so the funeral director would hold back the congregation while the pallbearers put the casket in the hearse. At this point, Sgt. Krawetz and another trooper approached Mr. Russo and asked if they could speak to him. Mr. Russo agreed and they went across the street. Sgt. Krawetz informed Mr. Russo

that he had an arrest warrant for one Anthony Russo for the crime of criminal homicide. The other troopers arrived on the scene including Lt. Marut, who checked the tattoos on Mr. Russo's arms and confirmed that it was the right Mr. Russo and arrested him.

After observing the plaintiff Anthony Russo and the photograph of the fugitive Anthony Russo, Sgt. Krawetz believed that they were the same person. He based his opinion on the physical descriptions and the four earrings in the left ear.

Plaintiff Anthony Russo was taken to the state police barracks and fingerprinted. Also, a criminal history was run on him and he was questioned on some of his prior charges. After the fingerprint comparison came back, he was released.

The sequence of events outlined by Lt. Marut and Sgt. Krawetz were confirmed by

Corporal Bombick and Trooper Slocum. In his deposition, Trooper Slocum referred to a stop that the troopers made while transporting the plaintiff Anthony Russo back to the barracks following his arrest. Specifically, he testified that they stopped for several minutes so that the Wilkes Barre Police Sergeant, John Curham, could attempt to identify the plaintiff. However, Sgt. Curham could not make a positive identification.

The testimony of the three Wilkes Barre Police Officers as to the identification of plaintiff Anthony Russo was also inconclusive. Chief Joseph Coyne testified that on August 23, 1993 the Wilkes Barre Police Department received a request from the Pennsylvania State Police to meet them to identify a person they had in custody. They were told by Lieutenant Marut that they had Anthony Russo in

custody and could the Wilkes Barre Police come to the scene to assist. When they arrived at the scene, they walked over to the unmarked car and John Curham looked into the car for identification. Sergeant Curham was unable to state if the correct individual was in custody. The plaintiff Anthony Russo was then taken to the barracks.

The testimony of Chief Coyne was confirmed by Assistant Chief Cawley and Sergeant Curham.

The deposition testimony of Michael Yeosock, the funeral director indicates that on the morning of august 23, he was approached by a state trooper at the church. The trooper asked him if there was an Anthony Russo present at the funeral. When Mr. Yeosock responded affirmatively, the trooper produced a photograph and asked him if it was the individual in the church.

Mr. Yeosock responded that he was not good at identifying anyone, but that one of the pallbearers did have earrings. Mr. Yeosock also stated that the only similarity between the man in the photograph and the pallbearer was that they both had earrings. During a second conversation with the state trooper, it was suggested that after the casket was placed in the hearse, the people would be held back in the church and Mr. Russo would be apprehended. As the casket was being placed in the hearse, a car pulled up, the troopers got out and Mr. Russo was taken by the arm.

In opposition to the motion for summary judgment, the plaintiff relies upon the deposition testimony submitted by the defendant, as well as the deposition testimony of Trooper Kaehn, Trooper Stitzer, Trooper Hahn, Trooper Myers, Trooper Sachney and Geraldine Mickelski.

Trooper Kaehn testified that on the weekend prior to August 23, she was the duty crime person at the barracks. She received a phone call at her house from the desk person, Trooper Scoble, telling her that Trooper Stitzer had said that Tony Russo's mother had died. When she received the call, she assumed that the Anthony Russo whose mother had died was the fugitive Anthony Russo. She tried to check the file in order to try to verify the information, but the file was not there. She then called Sergeant Krawetz, her supervisor, and advised him of the situation. He told her to notify Bloomsburg, which she did. Trooper Kaehn then went to Yeosock's funeral home with Trooper Boettger to look for Anthony Russo. Trooper Bevan, the trooper who was assigned to the investigation, was in Las Vegas on vacation at the time and the file was missing.

At the time she talked to Sergeant Krawetz, Trooper Kaehn learned that the fugitive Anthony Russo's family owned property in the Catawissa area. However, she did not know if they lived there.

She also received a call at the barracks from Lieutenant Marut while he was at Yeosock's funeral home on the day the plaintiff Anthony Russo was apprehended. Lt. Marut wanted to double-check the scars, marks and tattoos of the fugitive. She checked the flier and gave the information to him.

The deposition testimony of Trooper Stitzer, Trooper Hahn, Trooper Myers and Trooper Sachney paralleled the testimony of the other troopers.

In his first argument, defendant argues that because plaintiff's arrest was pursuant to a facially valid warrant, plaintiff's claim does not give rise to a

constitutional violation. Plaintiff cites Baker v. McCollan, 443 U.S. 137 (1979).

In Baker v. McCollan, the United States Supreme Court dealt with the wrongful identification and detention of an individual. In determining whether the detention was unconstitutional, the court held:

> For purposes of analysis, then, this case can be parsed with relative ease. Absent an attack on the validity of the warrant under which he was arrested, respondent's complaint is simply that despite his protests of mistaken identity, he was detained in the Potter County jail from December 30,when Potter County deputies retrieved him from Dallas, until January 2, when the validity of his protests were ascertained. Whatever claims this situation might give rise to under state tort law, we think it gives rise to no claim under the United States Constitution. Respondent was indeed deprived of his liberty for a period of days, but it was pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment.
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> Respondent's innocence of the charge contained in the warrant, while relevant to a tort claim of false imprisonment in most if not all

jurisdictions, is largely irrelevant to his claim of deprivation of liberty without due process of law. The Constitutional does not guarantee that only the guilty will be arrested. If it did, §1983 would provide a cause of action for every defendant acquitted-indeed, for every suspect released. Nor are the manifold procedural protections afforded criminal defendants under the Bill of Rights "without limits". Patterson v. New York, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 63 L.Ed.2d 281 (1977). "Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." Ibid.

The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law." A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers - all of whom may be potential defendants in a §1983 action - is entirely consistent with "due process of law." Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official

> charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.

Baker v. McCollan, supra at 144-146.

In his brief in opposition to the motion for summary judgment, plaintiff argues that Baker v. McCollan, supra, "is limited to the fact situation that a person wrongfully identified in an arrest warrant by the trickery of a third party has no right to an independent investigation by the arresting officer merely because the person protested his innocence. We believe plaintiff's argument is misplaced.

In the instant action, as in Baker v. McCollan, the validity of the warrant under which the plaintiff was arrested is not in dispute. As a valid warrant, it established that there was probable cause to believe that plaintiff had committed the

act charged and that plaintiff should be arrested and held to answer. Baker v. McCollan, supra at 142-143.

In his opposition brief, plaintiff relies heavily on the fact that the Wilkes Barre police were not notified earlier, that the state police did not thoroughly investigate the obituary of Helen Russo and that the funeral director did not provide a definitive identification. We find these arguments belie the instant record.

While it is true that the Wilkes Barre police department and Luzerne County District Attorney's Office were involved in the investigation and would have assisted the state police in arresting the plaintiff had they been called earlier, there is nothing in the record to support that anyone in the Wilkes Barre Police Department or Luzerne County District Attorney's Office would have been able to

make a positive identification of Defendant Anthony Russo. When the Wilkes Barre Police Officers, and in particular Sgt. Curham, who was involved in the case, were asked if they could identify the plaintiff, they answered negatively. Moreover, while plaintiff is correct that the obituary of Helen Russo set out certain information about Anthony Russo, the record establishes that Officer Beven, who was in charge of the case, was on vacation at the time, the investigative file was missing, and defendant, Lt. Marut did not learn of the investigation until the morning of August 23, 1993. Finally, while the testimony of Michael Yeosock was not definitive, he did not tell the police that the man inside was not the same man in the photograph.

While the plaintiff argues that based on the instant record, genuine issues of material fact exist surrounding the arrest

of plaintiff, we disagree. The cases cited by plaintiff in his brief are distinguishable in that they involve scenarios different from the instant situation. We believe that the instant plaintiff was arrested pursuant to a facially valid warrant under circumstances analogous to Baker v. McCollan, supra. Accordingly we will grant defendant's motion for summary judgment.

Additionally, we note that even if we were to accept plaintiff's argument that the warrant under which he was arrested was not valid as to him, we would still be constrained to grant defendant's motion for summary judgment under his second argument, namely, that he was entitled to qualified immunity for his actions.

In Orsatti v. New Jersey State Police, 71 F.3d 480 (3d Cir. 1995), a case involving the issue of qualified immunity based on a Fourth Amendment violation, the

court addressed the issue of probable cause.

> The general principles of law that govern this case are well settled. Broadly stated, the Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause. Papachristou v. City of Jacksonvile, 405 U.S. 156, 169 (1972).
>
> Probable cause to arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. See United States v. Glasser, 750, 1197, 1205 (3d Cir. 1984). Rather, probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested. [citations omitted]...
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> * * *
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> Typically, the dispositive issue in these types of cases is whether the right at issue was "clearly established" at the time the official acted. In this case, however, there is no question that the right at issue,namely, the right to be free from arrest except on probable cause, was clearly established at the time of Orsatti's arrest. Finding that the right at issue was clearly established, however, does not end the

> court's inquiry. Nor does the court's decision turn merely on whether the official violated that clearly established right. On the contrary, the Supreme Court has recognized that it is inevitable that law enforcement officers will in some cases reasonably but mistakenly conclude that probable cause to make an arrest is present. The court has made clear that in such cases those officers, like other officials who act in ways they reasonably believe to be lawful, will not be held personally liable. Id at 641.
> Orsatti v. New Jersey State Police, supra, 482-483.

With respect to defendant Lt. Marut, the record establishes that on the morning of August 23, 1993, Lt. Marut learned that a surveillance was being conducted at a funeral home for fugitive Anthony Russo. The file was missing; however, a flier on the fugitive Anthony Russo indicated his physical characteristics, tattoos on each arm, a scar on his wrist and multiple earrings. In addition, he learned that the funeral director stated that the individual in the church had multiple earrings. When

the plaintiff Anthony Russo was originally detained, Lt. Marut noted the physical characteristics, as well as the existence of tattoos on each arm, the scar on the wrist and the multiple earrings. As the court state in Orsatti v. New Jersey State Police, supra at 4984:

> The obligation of local law enforcement officers is to conduct criminal investigations in a manner that does not violate the constitutionally protected rights of the person under investigation. Therefore, whether the officers conducted the investigation negligently is not a material fact. Indeed, for Fourth Amendment purposes, the issue is not whether the information on which police officers base their request for an arrest warrant resulted from a professionally executed investigation; rather, the issue is whether that information would warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested.

Based on the information which Lt. Marut had available to him at the time of plaintiff's arrest, we find that the plaintiff's arrest was objectively reasonable.

Lt. Marut's belief that he had probable cause to arrest the plaintiff is supported by the instant record. Thus, Lt. Marut is immune from the instant action.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY RUSSO Plaintiff	:	CIVIL NO. 94-1613
vs.	:	(Judge Kosik)
JOSEPH MARUT Defendant	:	

ORDER

NOW, THEREFORE, this 24th day of January, 1996, IT IS HEREBY ORDERED THAT:

[1] the defendant's motion for summary judgment [document 10] is granted;

[2] judgment is hereby entered i favor of the defendant Joseph Marut and against the plaintiff Anthony Russo; and

[3] the Clerk of Court is directed to close this case.

Edwin M. Kosik
United States District
Judge

§1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of columbia shall be considered to be a statute of the District of Columbia.